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No. 223

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

SAMUEL GOLDBERGER and ADOLPH KAPLAN, *Petitioners*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

KAHL K. SPRIGGS,
504 Southern Building,
Washington 5, D. C.,
Attorney for Petitioners.

MICHAEL F. REILLY,
239 Washington Street,
Jersey City, New Jersey,
Of Counsel.

July 23, 1952.

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Petitioners, Samuel Goldberger and Adolph Kaplan, pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit affirming judgments and sentences of the United States District Court for the District of New Jersey against petitioners.

OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit (Record 64) has not been reported.

JURISDICTION

The decision and judgments of the United States Court of Appeals for the Third Circuit were rendered on May 29, 1952. Application by petitioners for extension of time to and including July 25, 1952 within which to file petition for a writ of certiorari was filed on June 25, 1952 and granted on that date by Mr. Justice Burton. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1). See also Rule 37 (b) (2), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether Section 371 of Title 18, United States Code (1948 revision) which increased the penalty from two to five years' imprisonment is an *ex post facto* law, as applied to a conspiracy which was begun and completed by overt act and therefore indictable before the effective date of Section 371, although some overt acts charged in the indictment occurred after that date.

2. As a corollary, whether or not the overt acts charged are merely ancillary to the substantive offense of conspiracy and could not sustain sentence under Section 371.

3. As a further corollary, whether the sentence of the petitioners to imprisonment for three years, which is in excess of that permitted by law before the enactment of Section 371, violated petitioners' rights under Article I, Section 9, of the Constitution of the United States.

STATUTES INVOLVED

Title 18 U.S.C., Section 88 (1946 ed.) provided:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud

> the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years or both."

Title 18, United States Code, Section 371 (1948 revision) provides:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> "If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

Collaterally involved are Title 18, United States Code, Section 80, 35 Stat. 555, 35 Stat. 1095, 40 Stat. 1015, relating to the making of false claims against the United States and Title 18, United States Code, Section 1001, 62 Stat. 749, pertaining to the making of false statements to departments or agencies of the United States.

STATEMENT

On April 3, 1951, a seven-count indictment was returned in the United States District Court for the District of New Jersey, the first count of which charged petitioners and others with violations of provisions of Section 88, Title 18, United States Code (1946 ed.) and Section 371, Title 18, United States Code (1948 revision). In addition to the conspiracy count of the indictment (Record 1-9), petitioners were charged in six other counts with substantive offenses (Record 9-22) relating to violations of Sections 80 and 1001 of Title 18, United States Code. The six counts

relating to the substantive offenses charged were all dismissed (Record 38-42).

The first count of the indictment, with which this petition is concerned, charges that petitioners with the others named in the indictment did conspire to commit offenses against the United States and to defraud the United States in violation of the provisions of Section 88, Title 18, United States Code (1946 ed.) and Section 371, Title 18, United States Code. It specifies nine overt acts as having been committed by one or more of the conspirators in furtherance of the conspiracy. Four of the overt acts specified were committed prior to September 1, 1948, one on September 1, 1948, and four subsequent to September 1, 1948 (Record 7, 8).

The first count charged that the conspiracy began on April 1, 1947 and continued until July 6, 1949 (Record 3).

On November 7, 1951, petitioners pleaded guilty to the first count of the indictment (Record 26, 27) and on January 4, 1952 each of the petitioners was adjudged to serve a sentence of imprisonment for three years and to pay a fine in the sum of $5,000.00 (Record 39, 40). The remaining six counts of the indictment were dismissed not only as to petitioners but also as to all other defendants on January 28, 1952 (Record 38-42).

On January 10, 1952, petitioners moved to correct the judgments and sentences imposed on the grounds that the same were contrary to law in that the sentences were greater than authorized by statute and law (Record 37). At the hearing on the motion petitioners contended the indictment, properly construed, charged an offense under Section 88, for which the maximum sentence was two years and that sentence under Section 371 violated the Constitutional prohibition of *ex post facto* laws. (Record 44-62). The motion was denied on January 28, 1952 and bail was allowed (Record 44). Appeal was duly taken to the United States Court of Appeals for the Third Circuit from such judgments (Record 43), and the judgments were affirmed

on May 29, 1952 (Record 64). The time to file petition for writ of certiorari was duly extended herein to and including July 25, 1952.

REASONS FOR GRANTING THE WRIT

The classic rule is enunciated in Calder v. Bull (1798), 3 Dall. 386, 390, 1 L. ed. 648, that "every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed," is *ex post facto*. In order to ascertain whether a particular law is *ex post facto*, it is, therefore, indispensable to determine the following: (1) the date the crime was committed; (2) the punishment provided for by law on the date the crime was committed; and (3) the punishment provided for by law pursuant to which the sentence was imposed. If (3) exceeds (2), such subsequent law is violative of the constitutional provision.

Section 88 provided for imprisonment not exceeding two years. That law was changed by the present Section 371, effective September 1, 1948, to provide for a maximum of five years' imprisonment. Petitioners were sentenced to serve three years' imprisonment, besides payment of fines. Since the punishment provided for by law pursuant to which sentence was imposed exceeded the punishment provided for by law at the time the crime was alleged by the Government to have begun, such later law was *ex post facto* if the earlier law was in effect at the time the crime charged was committed.

The offense of conspiracy under the statute becomes a crime and punishable when the unlawful agreement is made and one or more of the parties to the conspiracy performs an act to perfect its object. While the combination of minds in an unlawful purpose is the foundation of the offense, an overt act completes it as an indictable and punishable offense under the statute. *Hyde* vs. *United States*, 225 U.S. 347, 56 L. ed. 1114, 32 S. Ct. 793.

Moreover, the conspiracy constitutes the offense irrespective of the number or variety of objects which it seeks to attain or whether they be attained or not. The overt acts, which are ways of consummating the conspiracy, are purely ancillary to the substantive offense. As the court said in *United States* vs. *Manton*, 107 F. 2d 834, 839; cert. den. 309 U.S. 664, 84 L. ed. 1012, 60 S. Ct. 590:

> "The conspiracy constitutes the offense irrespective of the number of variety of objects which the conspiracy seeks to attain, or whether any of the ultimate objects be attained or not. Williamson v. United States, 207 U.S. 425, 28 S. Ct. 163, 52 L. Ed. 278. Mr. Justice White, speaking for the Court in that case, concisely stated the rule, by saying (207 U.S. page 447, 28 S. Ct. page 170, 52 L. Ed. 278): 'The conspiracy is the offense which the statute defines, without reference to whether the crime, which the conspirators have conspired to commit is consummated.' The indictment in that case charged that the defendants had conspired to suborn a large number of persons to commit perjury in proceedings for the purchase of public lands. The indictment was held good, although the persons to be suborned were not stated or the times or places particularized. It was not essential, the Court said, that these particulars should have been agreed upon since the criminality of the conspiracy charged consisted in the unlawful agreement to compass a criminal purpose.
>
> "The offense becomes complete when the agreement is made. The only effect of the requirement that an overt act shall be shown is to permit an abandonment of the conspiracy in the meantime and the consequent avoidance of the penalty which the statute imposes. 'This offense does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. The provision of the statute, that there must be an act done to effect the object of the conspiracy, merely affords a locus poenitentiae, so that before the act done either one

or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute.' United States v. Britton, 108 U.S. 199, 204, 205, 2 S. Ct. 531, 534, 27 L. Ed. 698."

* * *

"It charges a conspiracy to obstruct justice and defraud the United States, the scheme of resorting to bribery being averred only to be a way of consummating the conspiracy and which, like the use of a gun to effect a conspiracy to murder, is purely ancillary to the substantive offense."

Thus all the overt acts in the instant case are purely ancillary to the substantive offense of conspiracy, which became complete, indictable, and subject to penalty prescribed by Section 88 long prior to the effective date of Section 371. See also *Glasser* v. *United States,* 315 U.S. 60, 86 L. ed. 680, 62 S. Ct. 457.

In *United States* v. *Kissel,* 218 U.S. 601, 54 L. ed. 1168, 31 S. Ct. 124, the only question involved was whether the plea of the statute of limitations to the indictment was good. The Court held that a conspiracy can have continuance in time for the purpose of determining when the statute of limitations shall have tolled, and made it clear in the opinion that such was the only question before it. The Court also made it plain that a conspiracy having continuance in time was but a single conspiracy rather than "a cinematographic series of distinct conspiracies." Under the doctrine of the Kissell case, it seems evident that the conspiracy does not die three years after the commission of the first overt act but is kept alive by the performance of other overt acts simply for the purpose of avoiding the bar of the statute of limitations. However, because it still remains a single conspiracy, the offense is committed, completed and indictable upon the performance of the first overt act following the unlawful combination, and it is thereupon subject to penalty.

Such is made crystal clear by the decision in *Braverman* v. *United States,* 317 U.S. 49, 87 L. ed. 23, 63 S. Ct. 99, which reviews a number of the earlier decisions of this Court. The Court there said:

> "Both courts below recognized that a single agreement to commit an offense does not become several conspiracies because it continues over a period of time, see United States v. Kissel, 218 U.S. 601, 607; cf. In re Snow, 120 U.S. 274, 281-3, and that there may be such a single continuing agreement to commit several offenses. But they thought that, in the latter case, each contemplated offense renders the agreement punishable as a separate conspiracy.
>
> "The question whether a single agreement to commit acts in violation of several penal statutes is to be punished as one or several conspiracies is raised on the present record, not by the construction of the indictment, but by the Government's concession at the trial and here, reflected in the charge to the jury, that only a single agreement to commit the offenses alleged was proven. Where each of the counts of an indictment alleges a conspiracy to violate a different penal statute, it may be proper to conclude, in the absence of a bill of exceptions bringing up the evidence, that several conspiracies are charged rather than one, and that the conviction is for each. See Fleisher v. United States, *supra;* Shultz v. Hudspeth, 123 F. 2d 729, 730. But it is a different matter to hold, as the court below appears to have done in this case and in Meyers v. United States, *supra,* that even though a single agreement is entered into, the conspirators are guilty of as many offenses as the agreement has criminal objects.
>
> "The gist of the crime of conspiracy as defined by the statute is the agreement or confederation of the conspirators to commit one or more unlawful acts 'where one or more of such parties do any act to effect the object of the conspiracy.' The overt act, without proof of which a charge of conspiracy cannot be submitted to the jury, may be that of only a single one of the conspirators and need not be itself a crime.

Bannon v. United States, 156 U.S. 464, 468-9; Joplin Mercantile Co. v. United States, 236 U.S. 531, 535, 536; United States v. Rabinowich, 238 U.S. 78, 86; Pierce v. United States, 252 U.S. 239, 244. But it is unimportant, for present purposes, whether we regard the overt act as a part of the crime which the statute defines and makes punishable, see Hyde v. United States, 225 U.S. 347, 357-9, or as something apart from it, either an indispensable mode of corroborating the existence of the conspiracy or a device for affording a locus poenitentiae, see United States v. Britton, 108 U.S. 193, 204, 205; Dealy v. United States, 152 U.S. 539, 543, 547; Bannon v. United States, *supra*, 469; Hyde v. Shine, 199 U.S. 62, 76; Hyde v. United States, *supra*, 388; Joplin Mercantile Co. v. United States, *supra*.

"For when a single agreement to commit one or more substantive crimes is evidenced by an overt act, as the statute requires, the precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects. Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one.

"The allegation in a single count of a conspiracy to commit several crimes is not duplicitous for 'The conspiracy is the crime, and that is one, however diverse it objects.' Frohwerk v. United States, 249 U.S. 204, 210; Ford v. United States, 273 U.S. 593, 602; United States v. Manton, 107 F. 2d 834, 838. A conspiracy is not the commission of the crime which it contemplates, and neither violates nor 'arises under' the statute whose violation is its object. United States v. Rabinowich, *supra*, 87-9; United States v. McElvain, 272 U.S. 633, 638; see United States v. Hirsch, 100 U.S. 33, 34, 35. Since the single continuing agreement, which is the conspiracy here, thus embraces its criminal objects, it differs from successive acts which violate a

> single penal statute and from a single act which violates two statutes. See Blockburger v. United States, 284 U.S. 299, 301-4; Albrecht v. United States, 273 U.S. 1, 11-12. The single agreement is the prohibited conspiracy, and however diverse its objects it violates but a single statute; § 37 of the Criminal Code. For such a violation, only the single penalty prescribed by the statute can be imposed."

It is thus seen the Court took account of the rather varying views in earlier decisions concerning the nature and purpose of the overt act but unmistakably held in the *Braverman case* that the gist of the crime of conspiracy is the agreement or confederation to commit one or more unlawful acts where a single act on the part of any one of the conspirators to effect the object of the conspiracy takes place. Moreover, an agreement to commit one or more offenses does not become several conspiracies because it continues over a period of time, and *a fortiori* does not become subject thereby to several different penalties. Here, the conspiracy count of the indictment itself charges but a single conspiracy to commit several offenses against the United States, and describes in detail the means or methods by which the defendants named intended to effect the object of such conspiracy. Four overt acts were set forth, which included actions on behalf of petitioners to effect the objects of the conspiracy, all taking place prior to September 1, 1948 (Record 7, 8), some of which overt acts were actually the objects themselves of the conspiracy. The indictment on its face, therefore, charged a violation of Section 88, to which the petitioners pleaded guilty, and for which they should have been punished by the penalty of Section 88, as for only a single conspiracy.

This Court also recognized in *Fiswick* v. *United States*, 329 U.S. 211, 91 L. ed. 196, that though the result of the conspiracy may be continuing, the conspiracy does not thereby become a continuing one.

In the case at bar, the indictment charges but a single conspiracy to commit a number of offenses against the United States, which began in 1947 and was completed by an overt act alleged to have been done on or about December 20, 1947. The conspiracy was thus complete at such time and punishable under the law then existing, namely, Section 88. How could it be contended petitioners conspired in 1947 to violate, and became subject to punishment in a statute which was not enacted until June 25, 1948, effective until September 1, 1948; and *a fortiori* cannot be claimed petitioners conspired in 1947 to violate a law which was not enacted until June 25, 1948, namely, 18 U.S.C. Sec. 1001. The conspiracy here may have contemplated a number of overt acts, that is, whatever acts might prove necessary to accomplish the objective. The conspiracy itself was not continuing, only its results had to be in context. The one conspiracy, it is respectfully submitted, is the single crime present here. Although the statute of limitations may be tolled by the commission of subsequent overt acts in furtherance of the conspiracy, the statute does not or does not change the penalty applicable at the time the conspiracy was completed. Those two matters are separate and distinct in the law of conspiracy. There is punishable not at the quantum of punishment existing at the time of the last overt act but that which is in effect at the time the conspiracy is complete.

If the theory of the Government is correct and one of the defendants named in the indictment assumed became penitent and disassociated himself from the conspiracy on June 1, 1948, what punishment would be imposed? His punishment would be that in force at the time of his withdrawal. So far as the remaining conspirators are concerned, the Government would have their punishment measured by the statute in force at the time the last overt act was performed. Thus there would be different punishments for the same offense, the single conspiracy, if a subsequent statute diminished rather than augmented the

punishment, the same conspirator who suffered pangs of conscience and withdrew prior to the statutory change would be punished more harshly than the others who remained.

The courts below rested their decision on the case of *Huff* v. *United States,* 192 F. 2d 911, cert. den. 342 U. S. 946, 96 L. ed. 374, 72 S. Ct. 560. An analysis of that case shows that it failed to distinguish between the theory of a continuing conspiracy for the purpose of determining when the statute of limitations had run and the time when the conspiracy is first complete, indictable and punishable.

The phrase "continuing conspiracy" when carefully considered can have no other meaning in the law of conspiracy than its relation to the statute of limitations,[1] and a conspiracy must begin and become a punishable conspiracy at some time, which under the decisions is upon the performance of the first overt act after the unlawful combination. Its duration after that time neither makes it less nor more a conspiracy than when it first ripened into a crime. To hold that a greater penalty may be inflicted would in effect be punishment for subsequent overt acts, which in themselves are not punishable and do not constitute the crime of conspiracy. Indeed, the decision of this Court in *United States* v. *Britton,* 108 U. S. 199, 27 L. ed. 698, makes plain the nature and purpose of the overt acts.

While *Hyde* v. *United States, supra,* seems to take a variant view of the nature and effect of the overt act, nevertheless the earlier views as expressed in the Britton case and others following it have been given fresh impetus by *Braverman* v. *U. S., supra,* particularly on the point here involved, i.e., that a number of overt acts following the unlawful agreement do not convert a single conspiracy into multiple conspiracies subject to varying penalties.

Petitioners having pleaded guilty to the conspiracy charged to be a violation of Section 88, which was a single conspiracy and the only one charged, should not be pun-

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[1] *Brown* v. *Elliott,* 225 U. S. 392, 401, 56 L. ed. 1136, 32 S. Ct. 812.

ished under Section 371 notwithstanding that section was mentioned in the first count of the indictment.

CONCLUSION

It is respectfully submitted an important question in the law of conspiracy is raised by this petition, as to the nature and effect of overt acts, which in the light of *Braverman* v. *United States, supra,* and the somewhat variant decisions mentioned therein, should be settled by this Court, i.e., whether subsequent overt acts are a part of the conspiracy and expand a conspiracy begun, indictable and punishable prior to such overt acts; or whether they afford simply a locus poenitentiae and also a measurement for the running of the statute of limitations. As a corollary, there is the important question whether Section 371 could Constitutionally authorize punishment for a single conspiracy which began, was indictable and punishable prior to the effective date of that Section, even if some overt acts subsequent to the first in furtherance of the conspiracy have occurred after the effective date of Section 371.

Petitioners respectfully submit that the judgments of the District Court under Section 371 and as affirmed by the Circuit Court of Appeals are *ex post facto* as to them, and in violation of their rights under Article I, Section 9 of the Constitution of the United States, and this Court should grant their petition.

Respectfully submitted,

KAHL K. SPRIGGS,
504 Southern Building,
Washington 5, D. C.,
Attorney for Petitioners.

MICHAEL F. REILLY,
239 Washington Street,
Jersey City, New Jersey,
Of Counsel.

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